STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH WILLIAMSON, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 25, 2014
v	No. 308200 Wayne Circuit Court
G & K MANAGEMENT SERVICES, INC., d/b/a OMNI CONTINUING CARE, and CIENA HEALTH CARE MANAGEMENT, INC., Defendants-Appellants/Cross-Appellees.	LC No. 09-023611-CD

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Defendants G & K Management Services, Inc. and Ciena Health Care Management, Inc. are related companies that operate Omni Continuing Care, a nursing home facility in Detroit. Plaintiff Elizabeth Williamson brought this action against defendants under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., alleging that she was terminated in retaliation for participating in and cooperating with a state investigation that led to citations against the facility. A jury found in Williamson's favor.

Defendants challenge the trial court's denial of their summary disposition motion. A review of the evidence amassed prior to trial, however, reveals that Williamson created a genuine issue of material fact regarding defendants' motives in terminating her employment. Defendants also raise several challenges related to the jury trial, all of which lack merit. On cross-appeal, Williamson contends that the trial court should have awarded additional costs and expenses associated with her pretrial motion to compel discovery. That request was properly denied because it would have resulted in double recovery. We affirm.

I. BACKGROUND

Williamson worked for Omni as the facility's respiratory manager where she supervised a team of respiratory therapists. Part of Williamson's duties involved monitoring the tracheotomy tubes used by residents, which included ensuring that spare tubes of appropriate size and type were placed next to the residents' bedsides. Residents with tracheotomy tubes were housed in both the ventilator and skilled nursing care units at the Omni facility.

In 2009, Omni residents or their representatives reported two incidents that caused state regulators concern—one in which a resident was hospitalized and another in which a resident died, both caused by apparent negligence. As a result, in the spring of 2009, the state sent investigators to conduct a "complaint investigation." Around the same time, the state launched its annual survey of the facility to ensure that safety and care regulations were being followed. In late June 2009, reports were issued for both reviews that were unfavorable to Omni. The state cited Omni for multiple deficiencies. Williamson cooperated in the state's investigations and provided information to the investigators. She admitted to an investigator that some of the ventilators used by tracheotomy residents had dirty filters, a problem under the respiratory department's purview. Although the use of dirty filters was one of the items included in the list of citations issued by the state, the more serious citations involved nursing care.

Williamson worked at Omni on July 3, and then left for a short vacation. On July 6 and 7, defendants sent two consultants from the corporate offices, Debora Merrill and Nicole Davis, to Omni to conduct a special audit of the respiratory department. Defendants told Merrill and Davis that the audit was in response to the state's investigation. According to Omni's administrator, Carol Ferguson-Blake, the audit was necessary to correct the problems cited by the state before a follow-up investigation. Defendants did not conduct similar audits in other departments. During the audit, an incorrectly sized spare tracheotomy tube was found next to a resident's bedside. When Williamson returned to work on July 8, defendants terminated her employment, citing the incorrect tracheotomy tube as the principal reason for the termination. Defendants did not allow Williamson an opportunity to explain how the incorrect size tube could have been placed at the resident's bedside or the methods by which she attempted to prevent such mistakes. After Williamson's termination, defendants placed Davis in the facility as the interim respiratory manager.

Williamson subsequently filed this action under the WPA, alleging that defendants terminated her employment in retaliation for participating in the state investigation and providing information to investigators. Williamson alleged that defendants' proffered reason for her termination was mere pretext. The trial court denied defendants' pretrial motion for summary disposition. The court concluded that there were questions of fact regarding whether Williamson's discharge was causally related to her participation in the state investigation and whether defendants' proffered reason for her discharge was pretextual. A jury ultimately returned a verdict in Williamson's favor.

II. SUMMARY DISPOSITION

Defendants argue that the trial court erred in denying their motion for summary disposition pursuant to MCR 2.116(C)(10). They contend that the evidence failed to show a causal connection between Williamson's participation in the state investigation and her discharge and that Williamson did not successfully rebut their claimed nondiscriminatory reason for terminating her employment. We agree with the trial court's assessment that the pretrial discovery material created a genuine issue of material fact that needed to be resolved by a jury.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834

(1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48.

The WPA provides that "[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports . . . a suspected violation of a law or regulation or rule . . . to a public body, . . . or because an employee is requested by a public body to participate in an investigation . . . by that public body." MCL 15.362. A plaintiff may prove a claim of unlawful discrimination under the WPA with either directly or indirectly under the burden-shifting framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which has been adopted for use in WPA cases. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001); *Phinney v Perlmutter*, 222 Mich App 513, 563-564; 564 NW2d 532 (1997).

Williamson relied on the burden-shifting approach. To establish a prima facie claim under that approach, a plaintiff is required to show that she (1) "was engaged in protected activity as defined in the act," (2) "was discharged or discriminated against," and (3) "a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). "If [the] plaintiff is successful in establishing a prima facie case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action." *Shaw v Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). Once the defendant produces such evidence, the plaintiff has the burden of establishing that the defendant's proffered reasons were mere pretext. *Id*. The plaintiff can satisfy this burden by showing either that "a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Phinney*, 222 Mich App at 563. "The plaintiff can rely on the same evidence to prove both pretext and discrimination as long as the evidence would enable a reasonable factfinder to infer that the employee's [sic employer's] decision had a discriminatory basis." *Lytle v Malady*, 456 Mich 1, 28; 566 NW2d 582 (1997), citing *Udo v Tomes*, 54 F3d 9, 13 (CA 1, 1995).

Defendants do not dispute that Williamson was engaged in protected activity by participating in an investigation by a public body, or that her discharge qualifies as an adverse employment decision. Rather, defendants contend that Williamson failed to establish an issue of fact that her discharge was causally connected to the protected activity.

In support of the claimed lack of evidence, defendants note that approximately 20 other employees participated in the investigation and none were fired or disciplined. Only two employees were readily identifiable in the report, however. The state's reports identified employees who were interviewed by position and number to conceal their identities. Williamson and the facility's nursing director were the only employees referenced in the report who did not have peers. Every reference to the respiratory manager in the report, therefore, clearly implicated Williamson. And Williamson but not the nursing director provided information damaging to defendants.

In addition, Williamson submitted evidence that defendants' administrator, Ferguson-Blake, repeatedly demanded to know what Williamson told the investigators. Ferguson-Blake even brought in an attorney to question Williamson. When Williamson told Ferguson-Blake that she honestly told the investigators that the facility had no written policy regarding how to track "how often a patient's tracheotomy area was suctioned," Williamson averred that Ferguson-Blake essentially instructed her to lie: "Do not tell them we do not have a written policy, just come to me and I'll type one up." Ferguson-Blake admitted that the facility did not actually have written policies on many topics, but claimed that she "had multiple books of written policy" on site from which a written policy could be pulled for the facility should anyone ask.

Williamson presented evidence that during a management meeting, Ferguson-Blake commented that someone was "leaking" information to investigators and stared directly at Williamson. Williamson also claimed that Ferguson-Blake became upset when she told other employees that their interviews with the state investigators were confidential. Morsy Morsy, Ferguson-Blake's supervisor, even claimed at his deposition that the employees' communications to the investigators were not confidential. Williamson's evidence revealed that defendants were hostile towards the state's investigation, fueling their ire at an employee who shared unflattering information. As stated by Morsy in his deposition: "Surveyors were provoking staff to testify and they were told, 'Oh, don't tell anybody I'm asking those questions.' So there was a lot of gimmick going on, a lot of monkey business going on. . . . [T]he surveyors were just on a witch hunt."

Williamson presented evidence that defendants showed their hostility toward her by conducting an internal audit of her department immediately following the release of the state's report and while she was on vacation. Defendants did not audit any other departments, even the nursing department, out of which several serious problems arose. Specifically, a patient required emergency hospitalization after being given an overdose of Oxycontin and going into respiratory distress. The nurse failed to contact the respiratory therapy department for assistance as required by Omni policy. The nursing staff also falsified an incident report following a resident's death to indicate that a nurse, rather than a lab technician, had found the resident nonresponsive. Despite these major life threatening issues, Morsy testified that "no other department had a big issue" and the nursing department issues perceived by the state were "subjective." Ferguson-Blake also conceded that she made no "special request" to have any other departments assessed.

Williamson presented evidence that the internal audit may have been flawed. The auditors reported finding the wrong size or type of backup ventilator tubes at several residents' bedsides. When the state conducted its investigation, no such problem was noted. Further, Williamson presented numerous pages of daily ventilator flow sheets showing that the respiratory therapists under her command checked the bedside tubing every day and had never encountered a problem. Williamson requested discovery of her daily audit checklists showing that she had double checked the tubes on the days she worked. Defendants had destroyed those documents, however. Defendants admitted that they did not review any daily audit or ventilator flow forms before making their termination decision. Morsy conceded at his deposition that as a respiratory manager, it was Williamson's "responsibility . . . to audit and to periodically look to make sure that [the correct tubes are] being placed there" and that if an error occurred in between those checks, "there's nothing more that the respiratory manager could have done." Despite this concession, defendants terminated Williamson immediately upon her return from vacation.

The timing of Williamson's discharge also supports an inference that it was causally connected to her participation in the state investigation. The annual survey was completed on June 26, and the complaint investigation was completed on June 30. Williamson was terminated less than 10 days later. "[A] temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 177; 828 NW2d 634 (2013) (quotation marks and citation omitted). Just as in *Debano*, the current plaintiff "presented evidence of a causal link that shows more than a coincidence in time." *Id.* (quotation marks and citation omitted). The Supreme Court continued regarding the correlation between an adverse employment decision and an employee's whistleblowing activity:

> [I]t is reasonable to infer that the more knowledge the employer has of the plaintiff's protected activity, the greater the possibility of an impermissible motivation. Similarly, it is reasonable to conclude that the more an employer is affected by the plaintiff's whistleblowing activity, the stronger the causal link becomes between the protected activity and the employer's adverse employment action. [*Id.* at 178.]

Here, when viewed in the light most favorable to Williamson as the nonmoving party, the evidence supported a reasonable inference that defendants retaliated against Williamson for her negative comments during the state investigation of the nursing home. Williamson established a prima facie case that gave "rise to a rebuttable presumption that defendants unlawfully retaliated against" her. *Id.* at 178-179.

Defendants in turn indicated that they terminated Williamson's employment for a nondiscriminatory reason—because employees under her supervision placed the incorrect size of backup ventilator tubes at the bedsides of several residents and this error occurred in the middle of an official probe and could have placed the facility in jeopardy. However, the evidence created a genuine issue of material fact in relation to causation and also supported that defendants' proffered reason for termination was pretextual. See *Lytle*, 456 Mich at 28.

Further supporting that defendants' nondiscriminatory reason for terminating her was pretextual, Williamson presented evidence that she was terminated for an isolated matter in contravention to defendants' prescribed policy of progressive discipline. The employee handbook contains a list of several offenses that call for immediate termination upon a first offense, including a showing of incompetence in performing one's job. The handbook provides, "When discharge is called for under these rules, employees will be immediately suspended pending advisability of discharge." No such suspension occurred here.

Ultimately, based on the totality of the evidence amassed during discovery, the trial court correctly discerned the existence of several factual questions for the jury's consideration and denied summary disposition accordingly.

III. AMENDMENT OF PLAINTIFF'S WITNESS LIST

Defendants contend that the trial court allowed Williamson to engage in trial by ambush by permitting her to call Alicia Kuehn-Moore even though she was not listed on Williamson's

witness list. Kuehn-Moore was one of the state agents involved in the investigation of defendants' facility. Williamson asserted that she was initially unaware of Kuehn-Moore's identity and so stated on the witness list her intent to call "[a]ny employees of a government agency involved in investigating, surveying, or inspecting Defendants." Williamson learned Kuehn-Moore's identity more than a year before trial. Williamson noticed Kuehn-Moore's deposition, but Kuehn-Moore did not appear and the deposition was never rescheduled. Although Williamson failed to amend her witness list to include Kuehn-Moore by name, she identified Kuehn-Moore as a witness she intended to call at trial in the final pretrial order.

Defendant's objected to Williamson's inclusion of Kuehn-Moore on the final pretrial order. Defendants complained regarding other last minute additions and the court allowed defendants to depose another witness upon request just before trial. Defendants did not make a similar request in relation to Kuehn-Moore. At trial, the court determined that Kuehn-Moore's status as a potential witness was no "surprise" to defendants. The court chastised plaintiff's counsel for failing to amend the witness list, but permitted Williamson to present this witness's testimony. The court limited Kuehn-Moore's testimony to "whether she met with the plaintiff," "how many times . . . [h]ow long did she talk to her" and "[n]ot what the plaintiff told her."

A weekend separated the court's evidentiary ruling and Kuehn-Moore's testimony. The witness described that she spoke with Williamson approximately 10 times during the investigation. She opined that Williamson was "honest." Without objection from defendants, Williamson elicited testimony about the contents of her statements to Kuehn-Moore. Williamson also attempted to elicit testimony about other Omni managers' participation in the survey. Upon defendants' objection, the court limited Kuehn-Moore to describing the other managers' "demeanor." Kuehn-Moore then indicated that other managers in defendants' employ blocked her access to necessary records, claimed ignorance during questioning, and tried to interfere during subordinate employees' interviews. Kuehn-Moore claimed that one manager "fast walk[ed] down the hall" to get away from her and another spoke into her right shoulder during an interview, as if speaking into a recording device. All employees went into a "debriefing" with corporate management following their state interviews, according to Kuehn-Moore. Overall, the witness described defendants' agents as "angry."

We review a trial court's decision whether to allow amendment of a witness list for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). An abuse of discretion occurs when the court selects an outcome outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Witness lists are part of the discovery process and the objective of discovery is to make available to the parties, in advance of trial, the relevant facts that might be admitted at trial. The purpose of exchanging witness lists is to avoid "trial by surprise." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Any person not included on a witness list is "prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2).

Williamson established good cause to allow Kuehn-Moore's testimony despite her absence from the witness list and the court did not abuse its discretion in concluding that the presentation of this witness would not result in a trial by ambush. Kuehn-Moore was a state agent who investigated defendants' nursing home, so her testimony was clearly relevant to

Williamson's participation in that protected activity. It is apparent from the record that defendants were actually aware of Kuehn-Moore's identity and status as a potential witness well before trial.

Defendants contend that Williamson falsely asserted that she did not know Kuehn-Moore's identity at the time she filed her witness list. Defendants note that Williamson noticed Kuehn-Moore's deposition on May 25, 2010, and did not file her witness list until June 3. Regardless, Williamson had specified in her original witness list her intent to call any state employees who were involved in the investigation of defendants' facility.[1] After the state investigation, defendants received a copy of Kuehn-Moore's survey results. Thus, defendants were aware of Kuehn-Moore's identity as one of the state investigators, and were aware of the results of the investigation. Indeed, defendants identified Kuehn-Moore's survey results as an exhibit that they intended to introduce at trial. Defendants were also aware that Williamson had noticed Kuehn-Moore's deposition. And nothing prevented defendants from scheduling a deposition of their own after Kuehn-Moore failed to appear. Further, after Williamson announced her intent to call Kuehn-Moore as a witness, defendants did not request any additional time to depose or interview this witness despite that they had done so with another last-minute additional witness.

Considering Kuehn-Moore's role as one of the state agents who investigated defendants' facility, and the clear evidence that defendants were aware of Kuehn-Moore's status as a potential witness and had access to her investigation findings well before trial, we conclude that the trial court did not abuse its discretion in permitting Kuehn-Moore to testify at trial. The circumstances were sufficient to establish good cause for allowing her testimony, and the trial court was justified in discrediting defendants' claims of unfair surprise.

Defendants argue that the trial court made "irrational and disparate rulings" by precluding defendants from presenting evidence that similarly was not revealed during discovery. Defendants imply that the trial court thereby exhibited bias or preferential treatment of Williamson. First and foremost, the court's other evidentiary rulings are immaterial in determining whether the court properly permitted Williamson to present a late added witness. Moreover, the rulings against defendants were not legally similar to Williamson's motion to present a late added witness. Kuehn-Moore's testimony did not involve evidence that had not been disclosed during discovery. Rather, Williamson made a late addition of a witness of whom

[1] We acknowledge that in *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 776, 778; 404 NW2d 665 (1987), this Court held that it was insufficient for a party to state a general category on its witness list, which referred to "employees and representatives of Ross-Newman Associates," without providing the individuals' names. Thus, this Court ruled that the trial court erred in allowing those witnesses to testify without good cause being shown for not previously naming them. *Id.* at 778. In this case, the trial court did not rule that Kuehn-Moore qualified as a listed witness, but rather exercised its discretion to permit her to offer limited testimony after considering whether defendants would be surprised by her testimony, thereby indicating that its decision was based on a good-cause analysis.

defendants were aware during discovery. Similarly, while a party may be barred from presenting information not previously disclosed in discovery to support a new theory of which the opposing party was unaware, *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 670; 538 NW2d 420 (1995); *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 604-605; 568 NW2d 93 (1997), there is no merit to defendants' claim that Kuehn-Moore's testimony involved a new theory. Defendants' reliance on cases involving undisclosed expert witnesses is also misplaced because Kuehn-Moore was only a fact witness.

In sum, we conclude that the trial court did not abuse its discretion in permitting Kuehn-Moore to testify at trial.

IV. ADVERSE INFERENCE JURY INSTRUCTION

Defendants challenge the trial court's decision to give the jury an adverse inference instruction in accordance with M Civ JI 6.01(d) based on defendants' failure to produce the daily audit sheets created by Williamson during her employment. As noted, Williamson requested these documents during discovery. Williamson intended to use these records to rebut defendants' contention that she failed to address problems with maintaining proper size tracheotomy tubes in resident rooms. Williamson testified that she performed daily audits to ensure that the correct tubes were in place. The more recent audit forms were kept in a notebook on her desk, and older forms were kept in a cabinet in a file labeled "one east audits."

Williamson asked the court to instruct the jury in accordance with M Civ JI 6.01(d), which provides:

> (The [plaintiff/defendant] in this case has not offered [the testimony of [name] / [Identify exhibit.]]. You may infer that this evidence would have been adverse to the [plaintiff/defendant] if you believe that the evidence was under the control of the [plaintiff/defendant] and could have been produced by [him/her], and no reasonable excuse for [plaintiff's/defendant's] failure to produce the evidence has been shown.)

The trial court agreed to give the requested instruction with respect to the audit records and instructed the jury as follows:

> The defendants in this case have not offered the audit sheets that plaintiff completed daily to check spare tubes in one east [the skilled nursing unit]. You may infer that the [sic] this evidence would have been adverse to the defendant if you believe that the evidence was under the control of the defendants and could have been produced by them, and no reasonable excuse for defendant's [sic] – and there was no given – there was no reasonable excuse for defendant's [sic] failure to produce the evidence.

We review de novo claims of instructional error, but review for an abuse of discretion the question whether an instruction is accurate and applicable. *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009).

> A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party. [*Ward v Consolidated Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005).]

"[B]ecause SJI2d 6.01 is phrased in a permissive manner, the jury is not required to draw an adverse inference, but is free to decide for itself." *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 146-147; 640 NW2d 892 (2002) (quotation marks omitted).

Here, it is undisputed that defendants did not produce the requested records and those records were under defendants' control. The daily audit forms became unavailable to Williamson upon her termination. The evidence was material and not cumulative. Ferguson-Blake testified that one of the reasons for Williamson's termination was that she did not seem to care about doing her job correctly. Williamson testified that the missing audit records would show that she was monitoring and addressing the problems with the missing and incorrect size tubes. The records would also show that the problems with the spare ventilator parts were more of an issue in the nursing unit, in which no one was fired or disciplined, thereby supporting Williamson's position that defendants targeted her for an isolated incident as a pretext for discrimination. Contrary to defendants' contention, the records were not cumulative of Williamson's testimony regarding their existence. Williamson could not recall the content of any of the audit forms. Absent the forms, therefore, Williamson could not challenge the accuracy of the results of the internal audit or show that the correct tubes were in place on her last day of work.

Moreover, defendants lacked a reasonable excuse for their failure to produce the daily audit sheets. During Williamson's tenure, the forms were accumulated and stored for safekeeping. There is no record indication that the filed documents were in the way or needed to be disposed of for any reason. Defendants simply contend that they had no reason to know that the records would be an issue in any future lawsuit. If the jury believed that defendants honestly and innocently destroyed the records, the jury could choose not to draw an adverse inference from the failure to produce. The jury was not required to draw an adverse inference, but was "free to decide for itself" whether to do so. *Clark*, 249 Mich App at 146-147.

V. PRIVILEGED INFORMATION

Defendants assert that the trial court erred by requiring them to disclose ventilator flow sheets made by respiratory therapists. The records indicate whether the proper tracheotomy tubes were provided at resident bedsides as well as other innocuous information about the maintenance of facility ventilators. The sheets also included privileged information relevant to the residents connected to the ventilators that was not subject to disclosure. The court ordered the redaction of that information. Although a trial court's evidentiary decisions are generally reviewed for an abuse of discretion, *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004), whether the doctor-patient privilege applies to bar the release of the evidence is a legal question that we review de novo. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000).

Defendants argue that the trial court erred in requiring them to produce the patient ventilator flow sheets even though they were redacted to eliminate personal patient information. They contend that even with the redaction, state and federal law prohibited the disclosure of the information. Defendants argued below that the doctor-patient privilege of MCL 600.2157, and the Public Health Code, MCL 333.1101 *et seq.*, barred release of this information. Defendants argue for the first time on appeal that disclosure of the records was also prohibited by the federal Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*. An objection on one ground is insufficient to preserve an appellate attack on a different ground, however, *Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994), and we decline to review that issue.

Defendants' reliance on the Public Health Code, MCL 333.18701 and MCL 333.21707, is misplaced. The cited provisions merely establish that the residents' care while at defendants' facility was subject to a physician's directive. There is no dispute in this case that the residents were under the care of treating physicians. That fact does not mean that the records in question were privileged.

And the records were redacted to comply with the statutory doctor-patient privilege. MCL 600.2157 provides in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

In *Johnson v Detroit Med Ctr*, 291 Mich App 165, 169-170; 804 NW2d 754 (2010) (quotation marks omitted), this Court explained, "The physician-patient privilege protects the identity of nonparty patients regardless of need. The privilege prohibits the disclosure of any information acquired under the requisite circumstances, even if the patient's identity is redacted." Thus, the applicability of the doctor-physician privilege depends on whether the information sought to be released "was necessary to enable the person to prescribe for the patient as a physician."

We believe that this case is distinguishable from *Johnson* and *Baker* because the information at issue concerns medical equipment and its operation. The documents in question do contain the residents' vital information, but that information is included under the section titled "Patient Parameters," which the trial court ordered redacted. With the redactions, the information provided to plaintiff (and later to the jury) did not contain any treatment information from a physician for an identified resident. Instead, the unredacted information regarding the ventilator appears to concern only the nature of the equipment at each resident's bedside and its mechanical operation. With the appropriate redactions, we do not believe that the information disclosed was subject to the doctor-patient privilege.

VI. SANCTIONS

In her cross-appeal, Williamson argues that the trial court erred by failing to award her costs and attorney fees associated with her pretrial motion to compel discovery. Williamson

contends that MCR 2.313(A)(5)(a) entitled her to recover her reasonable expenses in bringing the motion. We find it unnecessary to address this issue because Williamson's entitlement to reasonable expenses associated with her motion to compel was encompassed within the trial court's award of reasonable attorney fees and costs to Williamson as the prevailing party in an action under the WPA, MCL 15.364. The court rule and statute both limit an award of attorney fees and costs to an amount the court determines is reasonable, and both provide the court with discretion not to award attorneys fees and costs if it determines that an award is inappropriate or unjust. The trial court's analysis of Williamson's requested attorney fees and costs under MCL 15.364 included an evaluation of the attorney fees and costs associated with the motion to compel. Thus, Williamson's reasonable expenses associated with the motion to compel are subsumed within the award of reasonable attorney fees and costs as a prevailing party under the WPA. Because plaintiff is not entitled to a duplicative recovery, see *Rafferty v Markovitz*, 461 Mich 265, 269-272; 602 NW2d 367 (1999), further relief is not warranted.

We affirm. As neither party prevailed in full, neither may tax costs. MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Karen M. Fort Hood